No. 571

In the Supreme Court of the United States

October Term, 1943.

RUBY LEE RUCKER, AND THE FOLLOWING NAMED PERSONS, ALL SIMILARLY SITUATED: MARGIE VAN SICKLE, BOBBIE HOFFMAN, GWENDOLYN SMITH, PAULINE BUTLER, BETHYL BRANDON ROBERTS,
Petitioners,

vs.

THE FIRST NATIONAL BANK OF MIAMI, OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF AND MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS.*

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PETITION FOR A WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioners pray that a writ of *certiorari* issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit, entered in the above entitled cause on October 27, 1943, affirming the decision of the District Court of the United States for the Northern District of Oklahoma.

Opinions Below.

This case was tried by the District Court of the United States for the Northern District of Oklahoma and judgment entered against the plaintiffs on November 5, 1942. (R. 79) Thereafter, the judgment of the District Court was appealed to the Circuit Court of Appeals for the Tenth Cir-

cuit and upon consideration, the Circuit Court of Appeals rendered an opinion on October 27, 1943, against the appellants (R. 91).

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Tenth Circuit was entered on October 27, 1943 (R. 92). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended, Title 28, United States Code, 347.

Question Presented.

The single question presented is whether the provisions of the Fair Labor Standards Act of 1938 as amended apply to an elevator operator, who operates the elevators in a building occupied by a national bank, engaged in commerce, whose upper floors served by the elevators, are rented out to tenants, the majority of whom are engaged in interstate commerce or the production of goods for interstate commerce.

The petitioners' position is that the court below erroneously answered the question in the negative, in conflict with prior decisions of this court.

Statute Involved.

The Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. Code, Secs. 201-219; as amended by Act of August 9, 1939, c. 605, 53 Stat. 1266, and Joint Resolution of June 26, 1940, Pub. Res. 88, 76th Congress) provides in part as follows:

> *Sec. 2 (a).* The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum stand-

ard of living necessary for health, efficiency, and general well-being of workers *(1)* causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; *(2)* burdens commerce and the free flow of goods in commerce; *(3)* constitutes an unfair method of competition in commerce; *(4)* leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and *(5)* interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this act, through the exercise by Congress of its power to regulate commerce among the several states, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Sec. 3. As used in this act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportations, transmission, or communication among the several states or from any state to any place outside thereof.

(c) "State" means any state of the United States or the District of Columbia or any territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any state or political subdivision of a state, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) * * *

(f) * * *

(g) * * *

(h) * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any state.

Sec. 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour.

Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 16 (b). Any employer who violates the provisions of Section 6 or Section 7 of this act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Statement.

The respondent, a national bank, employed the petitioners as elevator operators in the respondent's building, located at Miami, Oklahoma, for the periods set out below:

Appellants' Name	*Period Covered*
Ruby Lee Rucker	2-26-40 to 9-6-41
Margie Van Sickle	6-17-40 to 12-28-40 and 9-15-41 to 9-20-41
Bobbie Hoffman	11-4-39 to 6-15-40
Gwendolyn Smith	4-12-38 to 7-8-39
Pauline Butler	2-23-41 to 5-24-41
Bethyl Brandon Roberts	8-5-39 to 2-24-40

The elevator operators operated the elevators serving respondent's six-story building, the bank's quarters being located on the first floor and the upper floors being rented out to tenants, the major portion being engaged either in the production of goods for interstate commerce or were engaged in interstate commerce.

The entire sixth floor, or about 20% of the rental space in the building was occupied by the administrative offices of a mining and smelting company which operated mines in Oklahoma, Kansas and Missouri from which lead and zinc were mined and thereafter moved in interstate commerce. A part of the fifth floor was occupied by the executive offices of an interstate railroad. A part of the fourth floor was occupied by the office of a rock products company whose products moved in interstate commerce, samples of said products being mailed in interstate commerce from the office. Other portions of the building were occupied by a firm of brokers engaged in selling stocks and bonds in interstate commerce; another portion by an extension university which sold educational courses and works which moved in interstate commerce; another portion being occupied by an abstract and title company which prepared abstracts in the building, which moved in interstate commerce.

The foregoing occupied more than fifty per cent of the rented space in the building and over forty per cent of the total space. Other tenants who occupied lesser portions of space conducted other businesses which occasionally embraced interstate commerce.

During the period of petitioners' employment, they each received the sum of Five Dollars ($5.00) per week for forty-two hours of work one week and forty-six hours of work the next week, about ten cents (10c) per hour.

This suit was instituted to recover the difference between the $5.00 per week paid each of the petitioners and the additional sums due each petitioner under the minimum wage requirements as provided in Section 6 of the Fair Labor Standards Act of 1938 and to recover overtime compensation for the time worked in excess of the statutory maximum prescribed in Section 7 of the Act, liquidated damages and attorneys' fees.

The trial court held that the petitioners failed to prove that they were performing duties involving interstate commerce at the time their cause of action accrued and the court concluded, as a matter of law that the petitioners "were not performing duties involving interstate commerce," (Rec. 78-79), thus denying petitioners relief, from which adverse judgment petitioners appealed to the Circuit Court of Appeals for the Tenth Circuit, which court affirmed the judgment of the trial court.

Specification of Error to Be Urged.

The Circuit Court of Appeals for the Tenth Circuit erred in holding that the petitioners were not performing services which brought them within the purview of the Fair Labor Standards Act of 1938, as amended.

Reasons for Granting the Writ.

1. The decision of the court below is in conflict with the case of *Kirchbaum Company* v. *Walling,* 316 U. S. 517, 86 L. ed. 1638. In that case Your Honors held that an elevator operator whose services were useful or essential in a process or occupation necessary for the production of goods for commerce was within the coverage of the act and that it was not requisite that the operator come in actual physical contact with the goods produced.

There is no legal distinction between that holding and the one for which the petitioners ask in this case. In the *Kirchbaum* case, the building service employees (including elevator operators) furnished services to the tenants in the building who were engaged in the manufacture of, or the buying and selling of ladies garments. In this case the petitioners are all elevator operators serving the bank and its tenants, a majority of whom, were engaged in commerce or the production of goods for interstate commerce, although the principal part of such actual production was not carried on within the building, it being obviously impossible for a mining company or a railroad company to carry on its actual mining and railroad operations within the confines of an office building.

2. The decision of the Circuit Court of Appeals for the Tenth Circuit is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Home Ice Company* v. *Chapman,* 136 F. (2d) 353, *certiorari* denied October 11, 1943, ... U. S. ..., 88 L. ed. 35, and is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Walling* v. *Sondock,* 132 F. (2d) 77, *certiorari* denied 318 U. S. 772, 87 L. ed. 719.

Wherefore, it is respectfully submitted that this petition should be granted.

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